

Supreme Court, U.S.

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MICHAEL RODAK, JR., CLERK

BRIEF OF RESPONDENTS  
SCHENLEY INDUSTRIES, INC.,  
SCHENLEY DISTILLERS, INC., AND  
SCHENLEY AFFILIATED BRANDS CORP. ON  
PETITION FOR CERTIORARI

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UNITED STATES SUPREME COURT

NO. 77-1454

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Ralph S. Abernathy, Administrator of  
the Estate of Eural Frank Abernathy,  
PLAINTIFF-PETITIONER

vs.

Schenley Industries, Inc., Schenley  
Distillers, Inc., Schenley Affiliated  
Brands Corp., and Mecklenburg Board of  
Alcoholic Beverage Control,  
DEFENDANTS-RESPONDENTS

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REPORTS OF OPINIONS IN COURTS BELOW

Opinions and orders of the District Court dated July 31, 1967, and September 27, 1976, are reported in 420 F. Supp.

1. The opinion of the Court of Appeals for the Fourth Circuit is reported in 556 F. 2d 242.

STATUTES AND COURT RULES INVOLVED

In addition to the statutes and rules referred to in the Petition, the following are considered pertinent to the case:

1. 28 U. S. Code, § 2101, paragraphs (a), (b), and (c), set out in the Appendix. (A-1 to A-2)

2. Rule 40(a) of the Federal Rules of Appellate Procedure set out in the Appendix. (A-3)

3. From The Michie Company's 1969 Replacement Volume 1A, General Statutes

of North Carolina, Section 1-46 at page 71 and a part of Section 1-53 at pages 111-112 of said Volume 1A as follows:

"§ 1-46. Periods prescribed.-- The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article. (C. C. P., s. 30; Code, s.151; Rev., s.390; C. S., s.436.)

"§ 1-53. Two years.--Within two years--

. . .

"(4) Actions for damages on account of the death of a person caused by a wrongful act, neglect or default of another, under § 28-173 of the General Statutes of North Carolina. (1874-5, c. 243; 1876-7, c. 91, s.3; Code; ss.756, 3836; 1895, c. 69; Rev., s.396; C. S., s.442; 1931, c. 231; 1937, c. 359; 1945, c. 774; 1951, c. 246, s.2.)"

4. Rule 41(b) of the North Carolina Rules of Civil Procedure, Appendix (A-4

to A-5) from The Michie Company's 1969 Replacement Volume 1A, General Statutes of North Carolina, p. 667. This rule replaced former G. S. 1-25 involved in the cases cited in Exhibit F of the Petition, pages 68 and 69. G. S. 1-25 was repealed in 1970.

5. Excerpts from indicated pages of The Michie Company's 1975 Replacement Volume 1C, General Statutes of North Carolina, consisting of parts of Chapter 18A in effect prior to December 29, 1973, and still in effect, to wit: Parts of Section 18A-1 (p. 318); all of Section 18A-10 (p. 328); parts of Section 18A-15 (pp. 330 and 333); and parts of Section 18A-17 (p. 335). (Appendix A-6 to A-8)



QUESTIONS PRESENTED FOR REVIEW

Respondents accept Petitioner's statement of questions raised; but suggest that they are not questions appropriate for review under Supreme Court Rule 19(1).

STATEMENT OF THE CASE

On December 23, 1975, plaintiff filed this action for wrongful death alleging that his intestate died during the night of December 29, 1973, as a result of consumption of alcoholic beverages distributed by the Schenley defendants and sold to him by the Mecklenburg County Board of Alcoholic



Beverage Control.

The complaint undertook to allege federal and state claims resulting from failure of the defendants to have on their bottles a warning that excessive use would cause death from acute ethanol poisoning; and to allege that death did, in fact, result from that source. The Medical Examiner's report contained at pages 65 to 69 of the Appendix to the briefs in the Court of Appeals on page 69 gives acute ethanol poisoning as the primary cause of death and second-degree burns from hot water and fatty liver as contributory causes. Deceased was found dead in a bathtub partially filled with water. In addition to indicating that a contributory cause of death was burns from hot water, the Medical Examiner's

report at page 69 of the Appendix to the briefs in the Court of Appeals indicates that deceased had a history of alcoholism.

The defendants moved for summary judgment in the District Court. This motion was first denied by the District Judge on July 31, 1976. On motion to reconsider, the District Court dismissed the federal claims on the merits and declined to exercise pendent jurisdiction as to the state claims by order dated September 27, 1976. Abernathy v. Schenley Industries, Inc., et al., 420 F. Supp. 1.

On appeal, the Court of Appeals for the Fourth Circuit affirmed and wrote a per curiam opinion. Abernathy v. Schenley Industries, Inc., et al., 556 F. 2d 242.

In the concluding paragraph of its opinion, the Court of Appeals cited United Mine Workers v. Gibbs, 383 U. S. 725, 726 (1966), for its holding that the District Judge did not abuse his discretion in denying pendent jurisdiction to Abernathy's state law claims. The Court of Appeals did not quote, or incorporate by reference, any part of the opinion in the case of United Mine Workers v. Gibbs.

No petition to rehear was filed under Rule 40 of the Federal Rules of Appellate Procedure. No petition for certiorari to review the decision of the Court of Appeals reported at 556 F. 2d 242 was filed within the time provided by Title 28 U.S.C.A. § 2101, and no extension of time was applied for.

Petitioner, on September 23, 1977, filed an action in the Superior Court Division of the North Carolina General Court of Justice, against the Schenley defendants alone, alleging substantially the state law claims originally asserted in this action. On motion for summary judgment that action was dismissed on February 21, 1978 (pages 64-65 of the petition), on the ground that the action is barred by the North Carolina statute of limitations.

Petitioner gave notice of appeal in the state court action and thereafter on February 28, 1978, served, in the Court of Appeals in this action, the motion contained at pages 66 to 73 of the petition herein. In that motion Petitioner concedes that the

state court appeal is an exercise in futility. State Rule 41(b) (A-4 to A-5) does not sanction a court order extending the statute of limitations in case of dismissal on jurisdictional grounds. Also, as conceded in Petitioner's motion in the Court of Appeals (Petition, p. 69), the North Carolina courts have held former G. S. 1-25 not applicable to dismissals of actions instituted in federal courts. Petitioner's motion in the Court of Appeals was denied (see Petition, pages 74 and 75), and Petitioner served his Petition for Certiorari on March 30, 1978.

The affidavit of Petitioner's attorney attached to the Petition as Exhibit A (pages 25-27), was not before the courts below and seems inappropriate for consideration or discussion on the

present Petition.

ARGUMENT

Petitioner's assertion that the Court of Appeals set a trap for, and misled, him, is a blatant attempt to blame the Court for Petitioner's own neglect to protect whatever rights he had. To follow Petitioner's argument to its logical conclusion would mean that any plaintiff could control the Court's discretion discussed in United Mine Workers v. Gibbs, 383 U. S. 715, 726, by allowing his state law claims to be barred while prosecuting a federal court action. Then the federal court, according to Petitioner's argument, would have no choice but to exercise its pendent jurisdiction.

Petitioner could have brought another action in the state court within the statutory period and the pendency thereof would not bar the prosecution of his federal court action. Nor would the pendency of the federal court action have barred the state court action. Both could have been prosecuted concurrently until an adjudication on the merits in one of them.

Stanton v. Embrey, 93 U. S. 548,  
23 L. Ed. 983 (1877).

Kline v. Burke Construction  
Company, 260 U. S. 226, 67 L.  
Ed. 226 (1922).

Ballantine Books, Inc. v.  
Capital Distributing Company,  
302 F. 2d 17 (C. A. 2, 1962).

Allen v. Trust Company, 35 N. C.  
App. 267, 241 S. E. 2d 123 (1978).



In the case last cited, the report shows that the plaintiff brought a second action in the state court "to protect plaintiff from the running of the statute of limitations in the event the federal action should be dismissed for lack of jurisdiction." The Court stayed the action in state court until the federal action could be disposed of.

Petitioner knew, but the Court did not, that Petitioner had no action pending in the state court.

Petitioner's attorney undoubtedly knew that the state statute of limitations in wrongful death actions was two years.

Petitioner's attorney knew, or should have known, while the Court had no obligation to know in this

particular case, that, under North Carolina law, the pendency of the federal court action did not suspend the running of the statute.

If the predicament in which Petitioner has placed himself would have made any difference in the exercise of the discretion of the District Court or the decision of the Court of Appeals as to abuse of discretion, the fault in not having that feature in perspective was that of Petitioner and not of the courts.

It was the function of Petitioner's counsel to present in the District Court and in the Court of Appeals all reasons why pendent jurisdiction should be accepted. He could have petitioned for a rehearing

within the time period provided by Rule 40(a) of the Federal Rules of Appellate Procedure (A-3). At any of these stages, he could have advised the Court that Petitioner had already lost any right to sue in the state court. In the absence of the proper exercise of his function, the courts had no duty to determine whether or not Petitioner's action in the state court was barred.

It is not thought that timely argument of Petitioner's present position would, or should, have produced a different result. These functions of Petitioner and his counsel, as distinguished from the functions of the Court, are pointed out in answer to Petitioner's unwarranted attack on the integrity of the Court of Appeals.

While Petitioner has lost whatever rights he had to prosecute his state law claims by his own fault, or that of his attorney, and not by the fault of the Court, it does not appear that his state law claims could, in any event, be sustained on the merits. His asserted loss is without substance. The beverage in question was sold by an agency of the State of North Carolina, operating under a statute enacted by the Legislature of North Carolina, under the control as to advertising by the State Board of Alcohol Control. Chapter 18A General Statutes of North Carolina (A-6 to A-8). There is no

allegation or evidence that the State Board had any regulation requiring warning labels on the bottles or in the advertising of the product of the defendants. This specific legislation would control over the general warranty statute relied on by Petitioner (even if that statute was otherwise applicable which is denied).

Food Stores v. Board of Alcoholic Control, 268 N. C. 624, 151 S. E. 2d 582 (1966).

#### CONCLUSION

For the reasons hereinbefore stated, the respondents Schenley Industries, Inc., Schenley Distillers, Inc., and Schenley Affiliated Brands Corp., pray

that the Petition for Certiorari be  
denied.

Respectfully submitted,

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APPENDIX

28 U. S. Code § 2101

"§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

"(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

"(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown,



may extend the time for applying for  
a writ of certiorari for a period not  
exceeding sixty days."

\* \* \*

Rule 40(a) of the Federal Rules  
of Appellate Procedure

"Rule 40.

"PETITION FOR REHEARING

"(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case."

\* \* \*

Rule 41(b) of the North Carolina  
Rules of Civil Procedure

"Rule 41

"DISMISSAL OF ACTIONS

\* \* \*"(b) Involuntary Dismissal; Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this section and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a necessary party, operates as an adjudication upon the merits. If the court specifies that the dismissal of an action

commenced within the time prescribed therefor, or any claim therein, is without prejudice, it may also specify in its order that a new action based on the same claim may be commenced within one year or less after such dismissal. (Amended 1969)"

\* \* \*

Excerpts from Chapter 18A of  
the General Statutes of North Carolina

"§ 18A-1. Purpose of Chapter.--  
The purpose and intent of this Chapter  
is to establish a uniform system of con-  
trol over the sale, purchase, transpor-  
tation, manufacture, and possession of  
intoxicating liquors in North Carolina, and  
to provide administrative procedure to  
insure, as far as possible, the proper  
administration of this Chapter under a  
uniform system throughout the State.  
This Chapter shall be liberally construed  
to the end that the sale, purchase, trans-  
portation, manufacture, and possession of  
intoxicating liquors shall be prohibited  
except as authorized in this Chapter.  
(1937, c. 49, s. 1; 1971, c. 872, s.  
1.)"

\* \* \*

"§ 18A-10. Advertisements.--It shall  
be lawful to advertise anywhere or by  
any means or method liquor or the manu-  
facture, sale, keeping for sale, or  
furnishing of the means by which it may be  
obtained, or where, how, from whom, or  
at what price it may be obtained, pro-  
vided such advertising complies with the  
rules and regulations of the State Board  
of Alcoholic Control. (1923, c. 1, s.  
3; C. S., s. 3411(c); 1933, cc. 216, 229;  
1945, c. 903, s. 1; 1947, c. 1098, ss. 2,  
3; 1957, c. 1048; 1963, c. 426, s. 10;  
c. 460, s. 1; 1971, c. 872, s.1.)"

\* \* \*

"§ 18A-15. Powers and authority of State Board.--The State Board of Alcoholic Control shall have power and authority as follows:

\* \* \*

"(14) To adopt, amend, or repeal reasonable rules and regulations for the purpose of carrying out the provisions of this Chapter, but not inconsistent herewith, which rules and regulations shall become effective when filed as provided by law."

\* \* \*

"§ 18A-17. Powers and duties of county boards.--The said county boards shall each have the following powers and duties:

- "(1) Control and jurisdiction over the importation, sale and distribution of alcoholic beverages within its respective county;
- "(2) Power to buy and to have in its possession and to sell alcoholic beverages within its county;

\* \* \*

"(7) To import, transport, receive,  
purchase, sell, and deliver  
and have in its possession  
for sale for present and  
future delivery alcoholic  
beverages;

\* \* \*